

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL TODD DUNN,)	
)	
Petitioner,)	Civ. No. 07-420-TC
)	
vs.)	
)	
)	FINDINGS AND RECOMMENDATION
)	
JEAN HILL,)	
)	
Respondent.)	

Coffin, Magistrate Judge:

Before the court is petitioner's petition for writ of habeas corpus (#23). For the reasons that follow, the petition should be denied.

BACKGROUND

Petitioner was convicted of delivery of a controlled substance within 1000 feet of a school, delivery of a controlled substance, and possession of a controlled substance after entering a guilty plea. Resp. Ex. 103, 106. Under the Oregon Sentencing Guidelines, the seriousness level of his crime and his criminal history score indicated a presumptive prison term of 29 to 34 months. Resp. Ex. 103.

Based on petitioner's "persistent similar offenses," "violation of the public trust" and for "other" reasons, he received an enhanced sentence of 68 months followed by 36 months' post-prison supervision on October 23, 2003. Resp. Ex. 106. Petitioner's counsel did not object to the sentence, and

1 petitioner did not appeal his conviction. Pet. Ex. F.

2 Citing Apprendi v. New Jersey, 530 U.S. 336 (2000),
3 petitioner filed for post-conviction relief, alleging that his
4 conviction and enhanced sentence violated various constitutional
5 guarantees, and that trial counsel was ineffective for failing to
6 object to the enhanced sentence, notify petitioner that there was
7 an issue meriting appeal, investigate, prepare and try
8 petitioner's case, and defend petitioner at sentencing. Resp.
9 Ex. 107. Upon denial of post-conviction relief, petitioner
10 appealed to the Oregon Court of Appeals, which affirmed without
11 an opinion, and to the Oregon Supreme Court, which denied review.
12 Resp. Ex. 113, 117, 118.

13 In his amended habeas corpus petition before this court,
14 petitioner recited that he incorporated the original petition and
15 raised two grounds for relief, asserting:

16 ONE: The trial court violated petitioner's rights under
17 the Fifth, Sixth, Eighth and Fourteenth Amendments to
18 the United States Constitution when it sentenced him to
19 an upward departure based on facts found by the judge,
20 rather than by a jury, and not found beyond a
21 reasonable doubt.

22 Supporting facts: The aggravating facts found by the
23 trial judge as the basis for imposing an upward
24 departure sentence were neither found by a jury nor
25 found beyond a reasonable doubt. The departure
26 sentence imposed doubled the sentence petitioner faced
27 had the judge not found those facts.

28 TWO: Petitioner was denied effective assistance of
counsel in violation of the Sixth and Fourteenth
Amendments to the United States Constitution.

Supporting facts: Trial counsel failed to (a) properly
inform petitioner about potential penalties, (b) object
to the upward departure sentence imposed, (c) properly
inform petitioner about his appellate rights, and (d)
file a notice of appeal in petitioner's case.

2 Findings and Recommendation

1 Petitioner moved for conditional release, or, in the alternative,
2 expedited review, contending that his enhancement-related claims
3 would ultimately warrant release because petitioner has served 34
4 months, the maximum sentence he could have received without the
5 assertedly illegal enhancement. This court denied the motion for
6 conditional release but granted petitioner's request for
7 expedited review and has permitted the parties to follow an
8 accelerated briefing schedule.

9 Now, at the close of briefing and after a hearing on all
10 matters at issue, I recommend dismissal of petitioner's claims.¹

11 12 CLAIM ONE

13 Petitioner asserts that the post-conviction court erred in
14 determining that the imposition of an enhanced sentence, based on
15 facts not found by a jury beyond reasonable doubt, was not
16 contrary to federal law.² Under the Anti-Terrorism and Effective
17 Death Penalty Act of 1996 (AEDPA), a federal court may not grant
18 habeas relief regarding any claim "adjudicated on the merits" in
19 a state court unless the state court ruling "was contrary to, or
20 involved an unreasonable application of, clearly established
21

22 ¹ Petitioner explains that the amended petition was filed "to
23 clarify" petitioner's federal claims as articulated in the initial
24 petition. Pet. Memo. at 7. The court does not recommend relief on
untraversed claims. 28 U.S.C. § 2248.

25 ²Although petitioner did not directly appeal this issue to the
26 Oregon appellate courts, the post-conviction court did not rely on a
27 state procedural bar in disposing of the claim. See Thomas v.
28 Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992) (procedural default
applicable where state court opinion "clearly and expressly states
that its judgment rests on a state procedural bar.") (quoting Harris
v. Reed, 489 U.S. 255, 263 (1989)). Rather, it addressed the merits
Resp. Ex. 113. As such, this issue is not procedurally defaulted.

3 Findings and Recommendation

1 Federal Law, as determined by the Supreme Court." 28 U.S.C. §
2 2254(d)(1). The Supreme Court has explained that a state court
3 decision is "contrary to" federal law under the AEDPA if it
4 either fails to apply the correct Supreme Court authority or
5 applies the correct controlling authority to a case involving
6 "materially indistinguishable" facts but reaches a different
7 result. Williams v. Taylor, 529 U.S. 362, 405-07, 413 (2000).
8 Similarly, a state court decision is an unreasonable application
9 of federal law "if the state court identifies the correct
10 governing legal principle from [the Supreme] Court's decisions
11 but unreasonably applies that principle to the facts of the
12 prisoner's case." Lockyer v. Andrade, 538 U.S. 63, 75 (2003)
13 (citations omitted).

14 "In Williams and in subsequent decisions the Supreme Court
15 has repeatedly emphasized that 'an unreasonable application of
16 federal law is different from an incorrect application of federal
17 law.'" Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003)
18 (quoting Williams, 529 U.S. at 410). Thus, "[t]he petitioner
19 must demonstrate not only that the state court's application of
20 governing federal law was erroneous, but also that it was
21 objectively unreasonable." Ramirez v. Castro, 365 F.3d 755, 762
22 (2004) (citing Andrade, 538 U.S. at 75); see also Penry v.
23 Johnson, 532 U.S. 782, 793 (2001); Clark, 331 F.3d at 1068-69
24 (discussing Andrade and the appropriate standard of review).

25 Petitioner bases his argument on an application of the
26 Apprendi rule that was not made clear until Blakely v.
27 Washington, 542 U.S. 296 (2004), was issued during the year after
28 petitioner was sentenced. In short, petitioner argues that

1 Apprendi required a jury to find enhancement factors beyond a
2 reasonable doubt, and even if that requirement was unsettled at
3 the time of petitioner's sentencing, his defense counsel was
4 inadequate for having failed to object to the enhancement.
5 Leaving aside the ineffectiveness claim for the moment, it is
6 clear that, at the time of petitioner's sentencing, the trial
7 court did not contravene federal law in assuming the role of
8 factfinder to arrive at the findings used to support the enhanced
9 sentence.

10 The parties agree that, at the time petitioner was
11 sentenced, Apprendi v. New Jersey governed the federal jury trial
12 right of offenders in sentencing proceedings. Under the rule of
13 Apprendi, "Other than the fact of a prior conviction, any fact
14 that increase[s] the penalty for a crime beyond the prescribed
15 statutory maximum must be submitted to a jury, and proved beyond
16 a reasonable doubt. Apprendi, 530 U.S. at 490.

17 At the time of petitioner's sentencing, Oregon courts
18 applying Apprendi understood the applicable "statutory maximum"
19 for felonies to consist of terms set forth in Or. Rev. Stat. §
20 161.605, which set maximum terms of imprisonment for various
21 classes for felonies. See, e.g., State v. Dilts, 39 P.3d 276
22 (Or. App. 2002), aff'd 82 P.3d 593 (Or. 2003), vacated by Dilts
23 v. Oregon, 542 U.S. 934 (2004). For petitioner's crime, a Class
24 A felony, the "statutory maximum" was 20 years under that
25 standard. Then-current Supreme Court authority reaffirmed the
26 role of judicial factfinding in sentencing as long as the
27 sentence did not exceed statutory limits. See, e.g., Apprendi,
28 530 U.S. at 481 ("nothing in this history suggests that it is

1 impermissible for judges to exercise discretion-taking into
2 consideration various factors relating both to offense and
3 offender-in imposing a judgment within the range prescribed by
4 statute.").

5 What would change about Oregon sentencing only later -- and
6 provide a basis for petitioner's argument in post-conviction
7 proceedings -- is the meaning of "statutory maximum" for Appendi
8 purposes. That change came in 2004 with the clarification of
9 Appendi in Blakely v. Washington, 542 U.S. 296 (2004). The
10 defendant in Blakely pleaded guilty to kidnapping and use of a
11 firearm. Blakely, 542 U.S. at. 298-99. Like Oregon's sentencing
12 guidelines, those at issue in Blakely established a presumptive
13 sentence for a particular crime. Id. at 300. Both schemes also
14 permit the sentencing court to impose a sentence above the
15 standard range based on certain findings that would justify a
16 departure. In Blakely, the standard range for the crime to which
17 defendant pleaded guilty was 49 to 53 months. Finding that the
18 defendant had acted with "deliberate cruelty" (one of several
19 enumerated grounds for departure) the trial court departed upward
20 to 90 months. Id.

21 The defendant argued that imposing a sentence in excess of
22 the standard-range maximum under the state sentencing guidelines,
23 based on facts not found by a jury, violated his jury trial and
24 due process rights. The state contended that the relevant
25 statutory maximum for Appendi purposes was the 10-year maximum
26 for Class B felonies and not a standard-range maximum under the
27 state sentencing guidelines. Id. at 302.

28 The Court rejected the state's argument and set forth a
6 Findings and Recommendation

1 definitive measure of "statutory maximum" for Apprendi purposes:

2 Our precedents make clear * * * that the 'statutory
3 maximum' for Apprendi purposes is the maximum sentence
4 a judge may impose solely on the basis of the facts
5 reflected in the jury verdict or admitted by the
6 defendant. In other words, the relevant 'statutory
7 maximum' is not the maximum sentence a judge may
8 impose after finding additional facts, but the maximum
9 he may impose without any additional findings.

10 Id. at 303-04.

11 In the wake of Blakely, the Oregon Supreme Court adjusted
12 its understanding of "statutory maximum" accordingly, so that the
13 presumptive sentence under the guidelines, rather than the
14 maximum penalties for various classes of felonies under Or. Rev.
15 Stat. § 161.605, set the ceiling beyond which enhancement factors
16 must be proved to a jury beyond reasonable doubt. State v.
17 Dilts, 103 P.3d 95 (Or. 2004). In the same month, Oregon courts
18 clarified that enhancement of a sentence based on a finding of
19 "persistent involvement" required a jury determination, rather
20 than a review of the bare facts of a defendant's prior crimes.
21 State v. Perez, 102 P.3d 705 (Or. App. 2004), rev'd on other
22 grounds, 131 P.3d 168 (Or. 2006).

23 It would not be an exaggeration to assert that the
24 pronouncement of federal constitutional law in Blakely occasioned
25 a sharp departure from Oregon sentencing as it was conducted
26 post-Apprendi, on the basis of the clarification of "statutory
27 maximum." See Peralta-Basilio v. Hill, 126 P.3d 1 (Or. App.
28 2005), rev. denied, 132 P.3d 1056 (Or. 2006) (discussing effect
of Blakely). The fact that no post-Apprendi federal circuit
court of appeals decided issues analogous to those presented in
Blakely in the way that the Supreme Court finally did exemplifies

1 the unforeseeability of the Blakely holding. Id. at 3
2 (collecting cases).

3 As noted above, petitioner was sentenced prior to the
4 Blakely Court's clarification of Apprendi's "statutory maximum"
5 term. In view of this timeline, I cannot agree with petitioner
6 that the post-conviction court erred in determining that the
7 trial court's sentencing was "contrary to" Apprendi as it was
8 understood prior to Blakely. I recommend dismissal on this
9 claim.

10
11 CLAIM TWO

12 In his second claim, petitioner asserts that his defense
13 attorney provided constitutionally ineffective assistance in a
14 number of specifications set forth in his "supporting facts" for
15 that count. Because the first and fourth specifications are
16 defaulted, I address the second and third only.³

17 In ineffective assistance of counsel cases, the applicable
18 federal is the Strickland standard, which states that a defendant
19 alleging a Sixth Amendment violation must demonstrate "a
20 reasonable probability that, but for counsel's unprofessional
21 errors, the result of the proceeding would have been different."
22 Strickland v. Washington, 466 U.S. 668, 694 (1984). Thus, the
23

24 ³ The first and fourth grounds were not presented in the state
25 proceedings. Resp. Ex. 114. Even if the court were to consider them
26 in conjunction with the third ground, the ineffectiveness claim would
27 nonetheless fail on the merits because I reject petitioner's
28 underlying argument. The third ground was presented to PCR court and
to the Oregon Supreme Court, but not to the Oregon Court of Appeals.
Because the PCR court's disposition and the Oregon Supreme Court's
denial of review on that ground do not clearly rely on a state
procedural bar, I consider it. Thomas v. Goldsmith, 979 F.2d 746, 749
(1992).

1 task of the habeas court is to consider whether the post-
2 conviction court implemented an unreasonable application of
3 Strickland when it determined that petitioner was not denied
4 effective assistance of counsel.

5 Petitioner argues that his trial counsel was ineffective for
6 (1) failing to object to the sentencing enhancement on the basis
7 that it rested on facts not found by a jury beyond a reasonable
8 doubt, and (2) for failing to advise petitioner to appeal his
9 sentence based on the asserted error. He presents an affidavit
10 from his trial counsel in which his attorney asserts that he
11 believed that his professional conduct fell below constitutional
12 standards. Pet. Ex. F. Again, the timeline of post-Apprendi
13 legal developments stands in the way of petitioner's argument.

14 For purposes of the Strickland test, the reviewing habeas
15 court evaluates a trial attorney's conduct "as of the time of
16 counsel's conduct." 466 U.S. at 690. Here, hindsight can be
17 especially distorting. As noted above, at the time of
18 petitioner's sentencing, Blakely had not yet been decided, and,
19 in the case of felonies, the "statutory maximum" for Apprendi
20 purposes was not yet clarified to take on the meaning that it did
21 post-Blakely. At post-conviction, as here, petitioner argued
22 essentially that the iteration of Apprendi later announced in
23 Blakely should have been applied, and his attorney should have
24 argued at trial that the "statutory maximum" for Apprendi
25 purposes was the presumptive sentence under Oregon's guidelines
26 scheme, and advised an appeal on that basis. Resp. Ex. 107, ¶¶
27 8-12. In light of the legal context at the time, it is not error
28 to conclude that such an expectation would exceed the standard of

1 professional care required under Strickland. See United States
2 v. Gonzalez-Lerma, 71 F.3d 1537, 1542 (10th Cir. 1995), cert.
3 denied, 517 U.S. 1114 (1996) ("the failure of an attorney to
4 foresee future developments in the law" does not constitute
5 inadequate assistance), overruled on other grounds, United States
6 v. Flowers, 441 F.3d 900 (10th Cir. 2006); Cooks v. United
7 States, 461 F.2d 530, 532 (5th Cir. 1972) ("counsel's inability
8 to foresee future pronouncements which will dispossess the Court
9 of power to impose a particular sentence which is presently
10 thought viable does not render counsel's representation
11 ineffective").

12 The post-conviction court did not implement an unreasonable
13 application of the Strickland in determining that petitioner's
14 trial counsel was not constitutionally inadequate for failing to
15 object to the "statutory maximum" under Apprendi, nor for failing
16 to advise his client to appeal his sentence. The post-conviction
17 court provided a reasoned decision, adding reference to
18 McClanahan v. Hill, 112 P.3d 456 (Or. App.), rev. denied, 124
19 P.3d 609 (Or. 2005), which held, "Blakely and Apprendi do not
20 apply retroactively in a collateral proceeding[.]" I recommend
21 dismissal on this claim.

22 23 CONCLUSION

24 Petitioner's petition for writ of habeas corpus (#23) should
25 be denied, and this case should be dismissed. This
26 recommendation is not an order that is immediately appealable to
27 the Ninth Circuit Court of Appeals. Any notice of appeal
28 pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure,

1 should not be filed until entry of the district court's judgment
2 or appealable order. The parties shall have ten days from the
3 date of service of a copy of this recommendation within which to
4 file specific written objections. Failure to timely file
5 objections to any factual determinations of the Magistrate Judge
6 will be considered a waiver of a party's right to de novo
7 consideration of the factual issue and will constitute a waiver
8 of a party's right to appellate review of the findings of fact in
9 an order or judgment entered pursuant to the Magistrate Judge's
10 recommendation.

11
12 Dated this 21 day of February, 2008.

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15 _____
16 THOMAS M. COFFIN
United States Magistrate Judge